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Supreme Court, U.S.
FILED
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No. 03 - 36

In The
Supreme Court of the United States

KENNETH GOLDEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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HOPP

QUESTION PRESENTED

I. Whether the Third Circuit, in affirming the District Court's denial of Petitioner's Motion to Withdraw the Guilty Plea, rendered an opinion which was contrary to Supreme Court precedent and the Constitution of the United States, particularly the Second Amendment.

LIST OF ALL PARTIES

Pursuant to Supreme Court Rule 14.1, undersigned counsel hereby certifies that the following listed persons and parties have an interest in the outcome of this case.

1. **VAN ANTWERPEN**, Hon. Franklin S.
United States District Court Judge

2. **ZITTLAU**, Ewald
Assistant United States
Attorney/Counsel for Government

3. **GOLDEN**, Kenneth
Defendant/Appellant

4. **McMAHON**, John "Jack", Jr.
Pre-Plea Counsel for
Defendant/Appellant

5. **McMAHON**, John I., Jr.
Post-Plea and Sentencing Counsel for
Defendant/Appellant

6. **SHEIN**, Marcia G.
Appellate Counsel for
Defendant/Appellant

7. **CAMMARANO**, Michael J.
Pre-Indictment Counsel for
Defendant/Appellant

With respect to this Appeal, there are no corporate entities for purposes of disclosure.

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OPINION OF THE THIRD CIRCUIT COURT OF APPEALS:

The Opinion by the Third Circuit Court of Appeals was an unpublished Opinion. As such, there exists no formal citation for said Opinion. Reference to the Opinion is thereby limited to the following: **United States v. Golden**, No. 02-2925 (3d Cir. March 13, 2003)(unpublished), *rehearing denied*, No. 02-2925 (3rd Cir. April 8, 2003) (App. 1).

STATEMENT OF JURISDICTION

Petitioner respectfully seeks review on Certiorari from the decision rendered by the Third Circuit Court of Appeals on March 13, 2003 (App. 1), as well as the Third Circuit's Order of April 8, 2003, which denied a rehearing en banc (App. 12).

Pursuant to Supreme Court Rule 10, jurisdiction in the Supreme Court is now appropriate as the Third Circuit is believed to have entered a decision which is in conflict with the United States Constitution, as well as with the decisions of the Supreme Court.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

After review of the record, and the panel decision, it is the opinion of the undersigned counsel that the decision of the Third Circuit, in regard to the finding that no abuse of discretion existed in the district court's denial of Petitioner's request to withdraw the guilty plea as to the § 924(c) charge, conflicts with the decisions of both the Supreme Court and the Third Circuit, to wit: **Muscarello v. United States**, 524 U.S. 125, 118 S. Ct. 1911, 141 L.Ed.2d 111, (1998); **Smith v. United States**, 508 U.S. 223, 238, 113 S. Ct. 2050, 124 L.Ed.2d 138 (1993); **United States v. Loney**, 219 F.3d 281, 289 (3rd Cir. 2000).

Therefore, it is submitted that review and consideration by the entire court is necessary to secure and maintain uniformity of this court's decisions.

Additionally, the issue presented involves the following Constitutional provisions:

Second Amendment - " A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."

Fifth Amendment - "No person shall be . . . deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner made contact with a Confidential Source, for the purposes of acquiring cocaine. On September 1, 2000, Petitioner met with the Confidential Source and an Undercover Police Officer, in order to conduct the drug transaction. Petitioner provided the Undercover Officer with $3,000, in exchange for a quarter pound of cocaine. Upon receiving the money, the Undercover Officer placed Petitioner under arrest. During a subsequent search of Petitioner's vehicle, a loaded firearm was discovered in the driver's area of the vehicle, underneath the driver's seat.

On November 16, 2000, Petitioner was named in an Eight-Count Superseding Indictment, which charged as follows: Count I - conspiracy to distribute and possess with intent to distribute a mixture or substance containing a detectable amount of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846; Count II - attempt to possess with intent to distribute one quarter pound of a mixture or substance containing a detectable amount of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846; Count III - carrying a firearm, during and in relation to a drug

trafficking crime, in violation of 18 U.S.C. § 924(c)(1); Count IV - conspiracy to use facilities in interstate commerce, with intent to promote, carry on, and facilitate unlawful activity (prostitution), in violation of 18 U.S.C. § 371; and Counts V-VIII - four separate substantive offenses for using facilities in interstate commerce with intent to promote, carry on, and facilitate unlawful activity (prostitution), each in violation of 18 U.S.C. § 1952(a)(3). This Superseding Indictment also contained two Notices of Forfeiture, pursuant to 21 U.S.C. § 853, 28 U.S.C. § 2461(c), and 18 U.S.C. § 981(a)(1)(C).

On February 3, 2001, Petitioner entered into a written plea agreement with the government. On March 2, 2001, pursuant to said agreement, Petitioner appeared before the district court and pleaded guilty to all Counts of the Superseding Indictment. The district court accepted said pleas, and adjudicated Petitioner guilty on all of the aforementioned Counts. The matter was then set for sentencing, pending the completion of the Presentence Report.

On June 8, 2001, Petitioner filed a motion seeking to withdraw his guilty plea. On July 26, 2001, the district court held a hearing on this motion. After hearing from both Petitioner, and the government, the district court denied Petitioner's motion. This denial was memorialized in a Memorandum and Order, dated July 27, 2001.

Sentencing in this matter took place on September 19, 2001. After hearing arguments from both Petitioner and the government, the District Court imposed a total sentence of 108 months incarceration upon Appellant, and ordered that a fine of $10,000.00 be paid.

On October 15, 2001, Petitioner filed a Notice of Appeal. As this was untimely filed, Petitioner moved for an extension of time for which to file the Notice of Appeal. The district court denied Petitioner's motion for extension on December 19, 2001. Thereafter, on February 1, 2002, the Third Circuit Court of Appeals dismissed the appeal.

On May 6, 2002, Petitioner filed a motion, pursuant to 28 U.S.C. § 2255, seeking to vacate his sentence. On July 3, 2002, the district court held a phone conference concerning the § 2255 Petition. Finding that prior counsel was ineffective in failing to file a timely Notice of Appeal, the district court vacated the sentence, then re-imposed it, subject to all prior terms and conditions, and allowed Petitioner ten days in which to properly file a Notice of Appeal. Said actions were memorialized in an Order of the Court, filed July 8, 2002 (App. 10).

Following the "new" sentence, Petitioner filed a timely Notice of Appeal on July 11, 2002. On March 14, 2003, a panel for the Third Circuit Court of Appeals affirmed the judgment of the

district court [App. 1]. Subsequently, Petitioner sought further review by filing a Request for Rehearing En Banc. Petitioner's Request for Rehearing was denied on April 8, 2003 [App. 12].

The preset request for Writ of Certiorari is now properly before this Honorable Court.

ISSUES AND ARGUMENTS

I. WHETHER THE THIRD CIRCUIT, IN AFFIRMING THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION TO WITHDRAW THE GUILTY PLEA, RENDERED AN OPINION WHICH WAS CONTRARY TO SUPREME COURT PRECEDENT AND THE CONSTITUTION OF THE UNITED STATES, PARTICULARLY THE SECOND AMENDMENT.

According to the Third Circuit, there are three factors which guide a district court's determinations in exercising its discretion to grant or deny a motion to withdraw a guilty plea, to wit: (i) whether the defendant asserts his innocence; (ii) whether the government would be prejudiced if the plea is withdrawn; and (iii) the strength of the defendant's reasons for moving to withdraw. *See e.g.*, **United States v. Huff**, 873 F.2d 709, 712 (3rd Cir. 1989). Petitioner respectfully submits that such factors

were satisfied in his case, and that the Third Circuit, in affirming the district court's denial of the motion to withdraw the guilty plea, rendered an Opinion which was contrary to Supreme Court precedent and the Constitution of the United States, particularly the Second Amendment.

With respect to Count III of the Superseding Indictment, as Petitioner was not shown to have carried a firearm "during and in relation to" the drug crime, it is submitted that the facts and circumstances of the case were insufficient to support the conviction, and that Petitioner's guilty plea was inadequate, as it was entered without proper knowledge of the elements of the offense. It is/was submitted that such an improper plea and conviction warrants that the plea to Count III be vacated.

Elements of the Offense

According to 18 U.S.C. § 924(c)(1), it is a crime to "use" or "carry" a firearm during and in relation to any crime of violence or drug trafficking crime, or to possess said firearm in furtherance of any such crime. Under the facts of this case, it is clear that there was no "use" involved. *See* **Bailey v. United States**, 516 U.S. 137, 144, 116 S. Ct. 501, 133 L.Ed.2d 472 (1995) (observing that the "use" offense of § 924(c) requires "active employment" of a firearm). Furthermore, given the charging language of the Indictment, Petitioner was not charged with

"possession in furtherance of" a crime of violence or drug trafficking crime.

Given the above, and based on the charging language of the Indictment, in order for Petitioner to be convicted of the firearm offense it must have been established that Petitioner had "carried" the gun in question "during and in relation" to the drug trafficking offense of which he committed. *See* 18 U.S.C. § 924(c). As indicated by the plain language of the statute, the mere carrying of a firearm is not the criminal *actus reus* proscribed--rather it is the employment of the weapon in the context of another predefined crime. As such, and in the present case, there are two distinct aspects involved with Petitioner's "carrying" offense, to wit: (i) the actual carrying the firearm; and (ii) the fact that said "carrying" took place "during and in relation to" the drug trafficking.

As for "carrying" the firearm, the Supreme Court appeared to set forth the parameters of this aspect of the crime in **Muscarello v. United States**, 524 U.S. 125, 118 S. Ct. 1911, 141 L.Ed.2d 111, (1998). According to *Muscarello*, to "carry a firearm" also means "knowingly possessing and conveying firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies." *Muscarello*, 524 U.S. at 127.

As for the "during and in relation to" aspect of the offense, this appears to have been settled in **Smith v. United States**, 508 U.S. 223, 238, 113 S. Ct. 2050, 124 L.Ed.2d 138 (1993). In *Smith*, the Supreme Court stated that the phrase "in relation to", at a minimum, "clarifies that the firearm must have some purpose or effect with respect to the drug-trafficking crime." *Smith*, 508 U.S. at 238. The carrying of a firearm is not "in relation to" a drug crime if the firearm's presence is "coincidental or entirely 'unrelated' to the crime." *Id.* (quoting **United States v. Stewart**, 779 F.2d 538, 539 (9th Cir. 1985)). Instead, "the gun at least must 'facilitate, or have the potential of facilitating,' the drug trafficking offense." *Id.* (quoting *Stewart*, 779 F.2d at 540).

Taking this definition of "during and in relation", the Supreme Court noted that the limiting phrase, "during and in relation to" a crime, prevents liability for carrying a firearm from becoming liability for merely possessing it. *Muscarello*, 524 U.S. at 137. Furthermore, the Third Circuit has said that "the gun's relationship to a crime should not be 'accidental'". **United States v. Loney**, 219 F.3d 281, 289 (3rd Cir. 2000); *see also* **United States v. Warwick**, 167 F.3d 965, 971 (6th Cir. 1999) (to satisfy the "in relation to" requirement, "the evidence must support a finding that the firearm furthered the purpose or effect of the crime and that its presence or involvement was not the result of coincidence").

Application of the Above Principles

In Petitioner's case, the record indicates that (i) Petitioner had a lawful licence to carry a firearm in the State of Pennsylvania; (ii) Petitioner was an avid collector of firearms; and (iii) that Petitioner routinely and habitually carried a firearm in his vehicle for personal reasons. More importantly, at no time did Petitioner ever make reference to, or reach for, the firearm during the drug transaction. Additionally, Petitioner never admitted, or even suggested, that the firearm had any purpose or effect, whatsoever, with respect to the drug trafficking crime, by protecting either the money or the drugs.

As the firearm was discovered underneath the seat of the car he was driving, it would be a logical assumption that Petitioner, at some point in time, knowingly placed it there. In fact, it is not disputed that the weapon found in Petitioner's car, on the day of his arrest, was the gun usually, and habitually, kept in the car. Also not disputed, are the facts that there was nothing presented to show that the gun played any active role in the attempted drug transaction, and/or of any intent for said weapon to play such a role. What is in dispute is **whether the innocent, and legal, presence of the weapon, was/is sufficient to warrant the § 924(c) conviction.** The lawful carrying of a firearm is protected by the Second Amendment. To be convicted of carrying the firearm illegally,

pursuant to 18 U.S.C. 924(c), a criminal element of intent must be defined.

Obviously, one can exercise his/her Second Amendment rights by routinely using, carrying, or possessing a firearm, and § 924(c)(1) clearly does not prohibit that law-abiding conduct. Instead, § 924(c)(1) regulates the "use", "carrying", or "possession" of a firearm only during and in relation to a predicate offense. It is the absence of proof surrounding the alleged "in relation to" that Petitioner takes issue with.

Again, as *Muscarello* put it, the limiting phrase, "during and in relation to" a crime, prevents liability for carrying a firearm from becoming liability for merely possessing it. *Muscarello*, 524 U.S. at 137. Also, to reiterate what was said in *Smith*, the term "in relation to" "clarifies that the firearm must have some purpose or effect with respect to the drug-trafficking crime." *Smith*, 508 U.S. at 238. Appellant's gun possession was legal, as was its presence in the vehicle. Additionally, Petitioner's having the gun in his vehicle was so routine that it became, for all intent and purposes, an accessory of the car. While Petitioner may have subconsciously known that the gun was in the car, there was nothing to suggest that Petitioner purposely transported the weapon to the drug transaction with any intent to utilize it for any purpose. Again, with Petitioner making no reference to the weapon, and with the gun being relatively out of reach

under the seat, there is sufficient cause to deem the gun's presence "entirely unrelated" to the felony offense. Moreover, the facts strongly suggest, as in *Smith*, that the gun's presence was merely "accidental", and had no "purpose or effect with respect to" his drug offense.

This being the case, the facts of Petitioner's case did not provide a sufficient factual basis for the conviction. Furthermore, no sufficient factual basis can be gleaned through the Third Circuit's reliance on **United States v. Loney**, 219 F.3d 281 (3rd Cir. 2000).

As set out in the Third Circuit's decision, *Loney* held that "there is no need to show that the defendant's gun possession actually 'caused' any particular effect." *Loney*, 219 F.3d at 288. While this may be true, *Loney* should not be held to be dispositive of this case. First, the defendant in *Loney* was found to have a gun on his person, not merely in a car, as is the case for Petitioner. This is significant, in that *Loney* was arguing against a guideline enhancement, for possessing a weapon, rather than against a § 924(c) statutory charge. As such, the holding in *Loney* did not involve the elements, or interpretation thereof, required for a § 924(c) conviction, but rather the interpretation of a Guideline enhancement under U.S.S.G. § 2K2.1(b)(5). As such, the above-quoted passage from *Loney* only sets the standard for the application of a sentencing enhancement, under a preponderance of the evidence, and does not

"weigh in" on the finding of specific elements of the offense beyond a reasonable doubt.

Finally, while noting that the Guideline language of "in connection with" was similar to the "during and in relation" language found in § 924(c), the Third Circuit addressed the differences between the two concepts. *Loney* 219 F.3d at 287. Clearly, while both "in relation" and "in connection with" are quite expansive, the "in relation" standard is less so, given the burden of proof which requires a showing that a weapon facilitated or potentially facilitated the offense, as opposed to merely permitting an inference that it facilitated or potentially facilitated for guideline purposes. The Third Circuit's reliance on the *Loney* "inference" of potential facilitation was misplaced, and the court incorrectly applied a sentencing guideline standard, statutory elements and Second Amendment protections and should not have been used to uphold Petitioner's conviction, especially in light of the Supreme Court precedent cited above.

While *Loney* set forth that the evidence surrounding the gun's relationship to a crime must support a finding that the firearm presence or involvement was not the result of "accident" or "coincidence", the affirmations of the district court findings in *Loney* are far from being dispositive of Petitioner's case. In fact, the distinguishing nature of the evidence between Petitioner's case and that of *Loney*, along with

the differing standards employed in each case, tend to support Petitioner's position that no facilitation of the crime was proved or inferred.

Information as to the Plea

As for the plea, under the definitions set forth in *Muscarello* and *Smith*, the above facts may support a finding that Petitioner "carried" a firearm as contemplated by § 924(c). However, contrary to the information given to Petitioner by the district court at the time of the plea, the inquiry into the actual violation does not end there. Instead, the issues of whether the facts support a finding that Petitioner "carried" the firearm "during and in relation to" a drug-trafficking crime must be examined. This was never done.

As set forth above, when advising Petitioner as to the elements of the charge under 18 U.S.C. § 924(c), the district court stated that, according to *Muscarello*, "[c]arrying it a vehicle is sufficient to be carrying within the terms of the statute". While this may be true, for the "carrying" to have been actually in violation of the law, there is the aforementioned second aspect of the alleged crime, to wit: being deemed to have been done "during and in relation to" the underlying crime. The district court totally omitted the second, and most crucial, element of the offense, thereby ignoring the need for some nexus between the carrying of the weapon and the drug offense. As explained in *Muscarello*,

Congress added the "during and in relation to" language "in part to prevent prosecution where guns 'played' no part in the crime," 524 U.S. at 137; *see also* 524 U.S. at 139 ("The limiting phrase 'during and in relation to' should prevent misuse of the statute to penalize those whose conduct does not create the risks of harm at which the statute aims"). As such, the district court's reliance on only a portion of the *Muscarello* holding was insufficient to adequately inform Petitioner of the nature of the gun charge. This being the case, and without further explanation of the second element, Petitioner could not have entered a knowing and intelligent plea on this particular charge.

Additionally, during the hearing held on the Motion to Withdraw plea, the district court, again, relied only on the "carry" portion of the offense. Specifically, the court asked the government "Having it in the vehicle is carrying, Right?". The government responded in the affirmative, citing *Muscarello*. Again, there was no determination, or even an inquiry, made as to the "in relation to" aspect of the crime. "Carrying" is simply not enough.

Finally, the Third Circuit's decision appears to give great weight to the district court's colloquy, in which it was said that "the district court adequately defined the term 'carry' under the statute, and set forth all of the essential elements of the offense." Here, again, the "in relation to" aspect was ignored.

It is respectfully submitted that such determinations of the district court and the Third Circuit as well, totally misses the point of having a knowing and intelligent plea. First, as to the "statement of essential elements", was the district court telling Petitioner what the government had to prove to obtain the conviction. Without further defining the particular aspects of said elements (*i.e.*, what makes the act criminal), it cannot be said that Petitioner could enter a knowing guilty plea. Apparently recognizing this fact, the district court defined "carry", however, ignored the "during and in relation" aspect, leaving Petitioner with the district court's erroneous interpretation that carrying the weapon in the vehicle was all that was needed for the conviction. The district court's interpretation was woefully incomplete, and wrong, especially in light of *Muscarello*. As such, Petitioner was never fully informed of the proofs required to be made, and did not receive the benefit of a knowing and intelligent plea. The Third Circuit was equally remiss in failing to recognize *Muscarello* and/or *Smith*, and the need for a showing that the element of "during and in relation to" in order to sustain the conviction.

Given the above arguments, the record of this case is totally devoid of facts that would support a finding that Petitioner's carrying the firearm in his car was "in relation to" his attempted possession of cocaine. With Petitioner's firearm being present only by "mere

coincidence"/"accident", as Petitioner's routine and Second Amendment right of carrying a firearm in his car just happened to intersect the time of an attempt to purchase cocaine, there exists no identifiable nexus between the gun and the drug crime, as required, to support a conviction under section 924(c). As such, Petitioner's conviction constituted an infringement upon his Second Amendment to possess a firearm, as well as a denial of his Fifth Amendment/due process rights, as all of the elements of the charged offense were not adequately proved.

CONCLUSION

Given all of the arguments presented above, Petitioner Appellant respectfully requests that this Honorable Court to grant the present Writ of Certiorari.

Respectfully submitted,
/S/_____

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